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2 **BEFORE THE POLLUTION CONTROL HEARINGS BOARD**
3 **STATE OF WASHINGTON**
4

5 **AMERICAN INTERNATIONAL LTD.,)**
6 **INC.)**

7 **Appellant.)**

PCHB NO. 94-33

8 **v.)**

FINAL FINDINGS OF FACT
CONCLUSIONS OF LAW
AND ORDER

9 **STATE OF WASHINGTON,)**
10 **DEPARTMENT OF ECOLOGY,)**

11 **Respondent.)**
12

13 This matter came before the Pollution Control Hearings Board ("Board") on an appeal
14 filed by American International Ltd., Inc. ("American International") of Notice of Penalty
15 Incurred and Due No DE 94AQ-C107 issued by the Washington Department of Ecology
16 ("Ecology"). A penalty of \$3,000 was assessed for illegal burning.

17 The case came on for hearing on October 13, 1994 at the Board's offices in Lacey,
18 Washington. Administrative Appeals Judge, Phyllis K. Macleod, presided and Chairman.
19 Robert V. Jensen was present for the Board. Pursuant to respondent's request, the hearing was a
20 formal one. American International was represented by David Krull and Ecology was
21 represented by Law Clerk, Maia D. Bellon, and Assistant Attorney General, Mary Sue Wilson.
22 The proceedings were recorded by Randi R. Hamilton of Gene Barker & Associates, Inc.

23 Witnesses were sworn and heard, exhibits were introduced, and both parties presented
24 arguments to the Board. Based on the evidence presented, the Board makes the following
25

26 **FINAL FINDINGS OF FACT.**
27 **CONCLUSIONS OF LAW & ORDER**
PCHB No. 94-33

FINDINGS OF FACT

I

American International is a corporation with headquarters in Seattle Washington. During the summer of 1993, American International entered into a contract with the Kittitas County School District to demolish the Kittitas Elementary School.

II

Mr. Tyrone Grice was the project manager for American International on the Kittitas Elementary School demolition. Mr. Grice contacted Ecology for direction about open burning on the site. On or around June 25, 1993, Ms. Chrissie Caspar, Air Quality Specialist for Ecology, visited the site and discussed with Mr. Grice those items which cannot be legally burned in an outdoor fire. Mr. Grice agreed to contact Ms. Caspar to inspect any burn piles before they were ignited. No such request for an inspection was subsequently received by Ecology.

III

American International hired a firm known as Central Nursery, Inc. ("Central") to provide certain equipment and labor for the demolition project. Mr. Dale Wickers, an employee of Central performed much of the actual heavy machinery work in connection with the demolition. Mr. Grice of American International also operated heavy equipment during the demolition and placed material on the burn piles.

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IV

Mr. Grice provided general supervision on the demolition site and gave Mr. Wickers direction on the methods to use in creating the debris piles. Those directions did not include complete separation of prohibited materials from the burn piles.

V

Ecology received complaints about burning on the demolition site on August 20 and 24, 1993. In response to the complaints Ms. Caspar and Regional Air Quality Section Unit Supervisor, Ms. Susan Billings, inspected the project on August 24, 1993.

VI

During the site inspection Ms. Caspar and Ms. Billings observed four piles of debris which had been burned and a fifth unburned pile. All of the piles contained prohibited materials including painted wood, metal pipes and wiring, glass, fibrous material, plastics, concrete and bricks. Photographs taken at the site substantiate the presence of prohibited material in debris piles which had been burned.

VII

Based upon the August 24, 1993 site findings Ecology issued Notice of Penalty Incurred and Due No. DE 94AQ-C107 to American International assessing a penalty in the amount of \$3,000.00 under the provisions of RCW 70.94. Mr. Grice, on behalf of American International, timely appealed that penalty to this Board where it was given PCHB No. 94-33.

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VIII

American International claims that it made efforts to comply with open burning requirements and that the local fire chief examined the piles on at least one occasion which led them to believe that the operations on the demolition site were acceptable

IX

American International does not deny that it was in charge of the site at all relevant times nor does it dispute that statutorily prohibited material was burned on the site

X

American International claims that the illegal activity was a result of the actions of Central and Central's employees. On dates prior to August 20, 1994, one or more fires on the site were lit by Mr. Wickers of Central. Mr. Wickers set those fires at the request of American International supervisors.

XI

American International has received no prior penalties for open burning violations and cooperated with Ecology after the penalty was imposed.

XII

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such. From these Findings of Fact, the Board issues the following:

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CONCLUSIONS OF LAW

I

The Board has jurisdiction of this matter under RCW 42 21B and RCW 70 94

II

The Washington Clean Air Act authorizes the imposition of civil penalties on a strict liability basis for violations of any regulations implementing the statute RCW 70 94 431. The Act contains an express prohibition on allowing any outdoor fire "containing garbage, dead animals, asphalt, petroleum products, paints, rubber products, plastics, or any substance other than natural vegetation which normally emits dense smoke or obnoxious odors." RCW 79 94 775. The Ecology regulation governing open burning provides similarly

(1) the following materials shall not be burned in any outdoor fire: Garbage, dead animals, asphalt, petroleum products, paints, rubber products, plastics, paper (other than what is necessary to start a fire), cardboard, treated wood, construction debris, metal or any substance (other than natural vegetation) which when burned releases toxic emissions, dense smoke, or odors.

WAC 173-425-040

III

Ecology has the initial burden of proof in this appeal of a civil penalty and has met that burden by demonstrating that prohibited burning occurred on the site.

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IV

American International was the contractor for this demolition project and was in control of the site at all times when the violations occurred. Despite any role that Central or its employee had in actually setting the fires, American International was responsible for the burning activity on the site.

The Board has consistently held that a sub-contractor's role in causing an air pollution violation does not relieve the owner of any responsibility.

The Washington Clean Air Act is a strict liability statute. Acts violating its implementing regulations are not excused on the basis of intent. Moreover, the duty to comply cannot be delegated away by contract.

Pearson Construction v. PSAPCA, PCHB No. 88-186 (1989), Deering v. Olympic Air Pollution Control Authority, PCHB No. 93-124

V

American International claims that the amount of the penalty is excessive under the circumstances. The maximum penalty possible under RCW 70.94.431 is "an amount not to exceed ten thousand dollars (\$10,000) per day for each violation" of the Clean Air Act. The penalty assessed was for \$3,000 and related to burning several piles of debris on more than two occasions. The evidence established that burning took place on at least two occasions prior to the August 20 and 24 complaints. Given the prior knowledge of proper burning practices Mr. Grice obtained from Ecology personnel and the company's failure to obtain Ecology's proffered inspection of the unburned piles, the penalty of \$3,000 is reasonable under the circumstances.

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VI

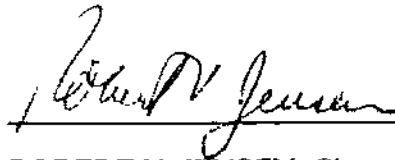
Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such. From the foregoing Findings of Fact and Conclusions of Law, the Board enters the following

ORDER

The Notice of Penalty Incurred and Due No DE 94AQ-C107 is **AFFIRMED**.

DONE this 29th day of November, 1994

POLLUTION CONTROL HEARINGS BOARD



ROBERT V. JENSEN, Chairman